Supreme Court, U.S.
FILED
DEC 10 1998
CLERK

No. 98-477

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1998

SALVADOR A. GODINEZ, Petitioner,

v.

JEROME WHITE, Respondent.

APPLICATION TO PROCEED *IN FORMA PAUPERIS*

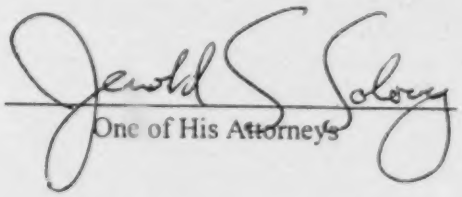
Pursuant to Rule 39.1 of the Supreme Court of the United States, respondent Jerome White respectfully requests leave to proceed *in forma pauperis* in this case and to file a Brief in Opposition to Petition for Writ of Certiorari without prepayment of costs. In support of this application, petitioner states:

1. Respondent is currently incarcerated and without means to pay costs in this case. The undersigned counsel was appointed pursuant to the Criminal Justice Act of 1964, 18 U.S.C. § 3006A, to represent the respondent in the United States District Court for the Central District of Illinois and the United States Court of Appeals for the Seventh Circuit. Counsel has agreed to represent respondent in this Court on a *pro bono* basis.

2. Petitioner was granted leave to proceed *in forma pauperis* by the United States District Court for the Central District of Illinois.

Respectfully presented,

JEROME WHITE

By: 
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Dated: December 10, 1998

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1998

SALVADOR A. GODINEZ, Petitioner,

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JEROME WHITE, Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether an individual in custody in Illinois for violating the Illinois Criminal Code is procedurally barred from raising claims, otherwise properly preserved and presented, in a federal habeas corpus petition because he did not raise those claims in a petition to the Illinois Supreme Court for discretionary review of the denial of his collateral attack under the Illinois post-conviction hearing statute, 725 ILCS 5/122-1, *et seq*.

ARGUMENT

In this habeas corpus action filed under 28 U.S.C. § 2254, the United States Court of Appeals for the Seventh Circuit examined the wholly discretionary nature of petitions for leave to appeal to the Illinois Supreme Court from denials of Illinois statutory collateral post-conviction relief. The court of appeals, with its very considerable knowledge of the particulars of Illinois practice and procedure, determined that federal habeas corpus petitioners who pursue state collateral review of their convictions are not barred by the exhaustion doctrine from litigating claims not raised in discretionary petitions for leave to appeal post-conviction rulings to the Illinois Supreme Court. *White v. Godinez*, 143 F.3d 1049, 1053 (7th Cir. 1998).[1/] Petitioner seeks a writ of certiorari from this Court. The compelling reasons necessary for certiorari are absent here, for the reasons stated below.

I. Because Federal Courts Of Appeals Are Best Equipped To Account For The Differences In Available State Collateral Review Procedures, Certiorari Should Be Denied.

The availability of state post-conviction collateral review is commonly a creature of statutes that vary among states. Petitioner ignores this fact, stating incorrectly that Respondent Jerome White's claims are "essentially the same claims raised on the petition currently pending before this Court in *Boerckel*." Petition for Certiorari at 6. *Boerckel* concerns the exhaustion requirement on a petition for leave to appeal to the Illinois

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1/ Previously, the Seventh Circuit had held that the exhaustion requirement did not require a habeas petitioner to include all claims on direct appeal in a petition for leave to appeal to the Illinois Supreme Court. *Boerckel v. O'Sullivan*, 135 F.3d 1194, 1202 (7th Cir. 1998), *cert. granted*, No. 97-2048 (U.S. Nov. 13, 1998). This Court has granted certiorari in *Boerckel* to answer the following question: "May an individual who is in custody pursuant to a state criminal conviction pursue claims in a federal habeas petition if those claims were not raised on direct appeal in a petition for discretionary review to the state's highest court?"

Supreme Court on direct appeal, however, and not on a petition for leave to appeal on collateral post-conviction review. Petitioner simplistically glosses over the variances among state collateral review procedures, and the crucial differences between direct appeal and collateral post-conviction review. While the states are virtually uniform in their treatment of direct appeals, justifying this Court's grant of certiorari in *Boerckel*, their treatment of post-conviction procedures varies widely, with some states even providing a right to counsel during post-conviction proceedings, while others treat post-conviction proceedings as an avenue for relief only in the most exceptional of circumstances. Nevertheless, the Petition for Certiorari in this case is a near-verbatim copy of the Petition presented in *Boerckel*, which involves the viability of habeas claims not presented to the highest state court on *direct appeal*.

The variances among the different states' post-conviction collateral review procedures demonstrate why Petitioner cannot show a compelling reason to grant certiorari in this matter: there simply is no basis for providing a uniform exhaustion rule relative to a state proceeding that varies so widely from state to state. Indeed, the rule that petitioner urges upon the Court here will do little more than require countless prisoners in many states to make filings futile under the prevailing practices in their states, while adding significant time delays to the path leading to the final adjudications of their convictions. The individual federal courts of appeals -- localized as they are -- remain best equipped to analyze individual states' collateral review procedures and practices, and therefore, to decide whether the failure to include a collateral review claim in a discretionary review petition to a state's highest court should bar the litigation of that claim in a federal habeas petition.

In most states, after the conviction is final on direct appeal, a prisoner may petition the state court as a matter of right for post-conviction or state habeas corpus relief. *See* Donald E. Wilkes, Jr., *State Post-Conviction Remedies and Relief* § 3-2 at 117-18 (1996). State law and practice determine the range of claims attacking the conviction and sentence that a prisoner may raise in post-conviction proceedings. *See* James S. Liebman & Randy Hertz, *Federal Habeas Corpus Practice and Procedure* § 6.2 at 138 (2d ed. 1994). Generally, a state prisoner can attack the conviction in state court collaterally only by challenging the legality of the prisoner's confinement under the state or federal constitutions. If post-conviction claims on collateral review are denied, a prisoner can appeal and can request the state's highest court to exercise its powers of discretionary review.

Yet, the availability of state post-conviction remedies on collateral review varies greatly among the states. *See* Liebman & Hertz, § 6.1 at 137. State habeas corpus is the principal post-conviction remedy in 12 states: California, Connecticut, Georgia, Nevada, New Hampshire, New Mexico, South Dakota, Texas, Utah, Virginia, Washington, and West Virginia. *See* Wilkes, § 3-3 at 130, App. A. In 11 of these 12 states a habeas corpus petition must be filed in the trial court, either the court of confinement or the convicting court. In Washington, however, a state habeas petition must be filed in the state intermediate appellate court. *Id.* at 130-31. The other 38 states have either adopted by statute or court rule as their principal post-conviction remedy variations of the Uniform Post-Conviction Procedure Act, or the post-conviction remedy for federal prisoners codified at 28 U.S.C. § 2255, or even miscellaneous remedies in the nature of *coram nobis*. *See* Wilkes, § 3-4 at 133-39, App. A. These various post-conviction remedies have different statutes of limitations. *See* Wilkes, § 3-2 at 120-21.

Furthermore, in addition to their principal post-conviction remedies, some states provide other remedies. For example in Wisconsin, a prisoner can petition for state habeas corpus relief *in addition to* the state's principal post-conviction remedy. *See* Wis. Stats. §§ 974.06, 782.01 *et seq*. In other states, like New York, the common law writ of error *coram nobis* is an available post-conviction remedy to raise a claim of ineffective appellate counsel and must be instituted initially in the appellate court. *See* Wilkes. § 3-5 at 148-49; *People v. Bachert*, 509 N.E.2d 318, 322 (N.Y. 1987).

Post-conviction remedies also vary within states depending upon the type of case. For example, Minnesota provides for appeal of the denial of post-conviction relief to the Minnesota Supreme Court as of right in first-degree murder cases only. *See* Minn. R. Crim. P. 29.02(1). Otherwise a petitioner must go first to the intermediate appellate court, and may appeal an appellate court decision to the Minnesota Supreme Court only with the Supreme Court's leave to appeal, which is subject to the Court's broad discretion. *See* Minn. R. Crim. P. 29.02(2). Furthermore, states often have special rules for death penalty cases. In Texas for example, the statute of limitations for state habeas corpus only applies to death penalty cases, in which the petitioner must file a petition in the convicting court not later than 45 days after the appeal is filed on direct appeal. *See* Tex. Code Crim. P. § 110.071(4)(a). Other states have shorter statutes of limitations in death penalty cases than in noncapital cases. *See e.g.*, Md. Ann. Code, art. 27, § 645A(a)(2)(ii) and (3)(i) (statute of limitations on applying for post-conviction relief is within 10 years of sentencing in noncapital cases and 210 days after the denial of certiorari by the U.S. Supreme Court in a capital case).

Variances among state collateral review procedures may present practical differences during the state appellate review process, and those differences could have direct

and significant bearing on the exhaustion issue. In Illinois, the federal courts have noted that where a petitioner fails to take a discretionary appeal to the state's highest court on post-conviction review, the petitioner has much less at stake because the likelihood of the Supreme Court granting review is even more remote than on direct appeal. *Galvan v. Gilmore*, 997 F. Supp. 1019, 1029 (N.D. Ill. 1998). Given that state supreme court review in Illinois is a much more remote possibility on collateral post-conviction review than on direct appeal, it follows that the decision below would not be in conflict with that of another federal court of appeals considering the application of the exhaustion doctrine in a jurisdiction where the likelihood of state supreme court review of claims for collateral relief is substantially higher than in Illinois.

According to the Eleventh Circuit, Georgia is just such a state. *See Hughes v. Stafford*, 780 F.2d 1580, 1581 (11th Cir. 1986). When deciding whether to take a case on collateral review, the Georgia Supreme Court considers the merits of a petitioner's claim, free of the structural concerns (like the existence of a conflict in the intermediate appellate courts or the public importance of the issue) that constrain its discretion to take cases in direct appeals. *Id.* at 1581. Therefore, the Eleventh Circuit concluded that under Georgia law, state supreme court review of a petitioner's collateral appeal on the merits is more likely on discretionary collateral review than on direct review. *Id.* Therefore, the Eleventh Circuit holds that an appeal to the Supreme Court of Georgia in collateral proceedings is an available state remedy which a petitioner must pursue for exhaustion purposes. *Id.* [2]

2/ *See also Buck v. Green*, 743 F.2d 1567, 1569 (11th Cir. 1984) (concluding that the limited discretionary review criteria of Georgia's highest court applied on a defendant's direct appeal offered no practical remedy for exhaustion purposes).

In addition, the availability of counsel during state collateral proceedings varies among states. The Seventh Circuit has noted that treating an omission from a petition for discretionary state supreme court review as a procedural bar could create a trap for unrepresented prisoners on collateral review, who may have a difficult time identifying unsettled and important issues suitable for discretionary collateral review. *Hogan v. McBride*, 74 F.3d 144, 147 (7th Cir. 1996). Unlike on a defendant's direct appeal as of right, there is no federal constitutional right to counsel in state post-conviction proceedings, which includes framing a petition for leave to appeal to a state's highest court on collateral review. *Pennsylvania v. Finley*, 481 U.S. 551, 554-55 (1987). The critical stage of the state appellate process, in which a defendant has the right to counsel, is a defendant's direct appeal. In *Finley*, this Court stated that (*id.* at 556-57) (citations omitted):

> Postconviction relief is even further removed from the criminal trial than is discretionary direct review. It is not part of the criminal proceeding itself, and is in fact considered to be civil in nature. It is a collateral attack that normally occurs only after the defendant has failed to secure relief through direct review of his conviction. States have no obligation to provide this avenue of relief, and when they do, the fundamental fairness mandated by the Due Process Clause does not require that the State supply a lawyer as well.

The practical availability of state supreme court review may be more remote on collateral appeal in some states due to the lack of availability of post-conviction counsel. While there is no constitutional right to counsel on collateral appeal, 25 states generally provide for appointed counsel to indigent petitioners for post-conviction relief. *See* Wilkes, § 3-2 at 124.[3/] Others afford the right to appointed counsel to post-conviction applicants

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3/ States which provide mechanisms for the appointment of counsel on post-conviction collateral review by statute, rule of court, or case law include: Alabama, Alaska, (continued...)

under a death sentence only. *Id.*[4/] In Illinois, appointed counsel may be provided for defendants who file pro se post-conviction petitions, but there is no *right* to the assistance of counsel in post-conviction proceedings. *People v. Partee*, 645 N.E.2d 414, 422 (Ill. App. Ct. 1994); 725 ILCS 5/122-4. Therefore, in many cases in Illinois indigent prisoners may go unrepresented on collateral appeal. The fact that there is no right to counsel on collateral review in Illinois shows that Illinois places a lesser priority on post-conviction collateral claims than it does on direct appeals. Requiring federal habeas petitioners in Illinois to litigate their *collateral* claims all the way up to the Illinois Supreme Court makes little sense in view of the lower premium Illinois places on state collateral relief.

Procedural differences such as these undermine Petitioner's claim that the decision below is in conflict with other federal courts of appeals, and further demonstrate why there is no compelling reason to grant certiorari in this matter. The fact that the courts of appeals might reach different conclusions concerning whether the exhaustion doctrine applies to claims not raised in a discretionary petition for state high court review does not justify the exercise of this Court's discretion to grant certiorari in this matter. This is not an issue for which uniformity is necessary or even desirable.

3/ (...continued)
Arizona, Connecticut, Hawaii, Illinois, Indiana, Kansas, Kentucky, Maryland, Minnesota, Missouri, New Jersey, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Vermont, West Virginia, and Wisconsin. *See* Wilkes, § 3.2 at 124, App. A.

4/ States which provide appointed counsel to post-conviction applicants under a death sentence include: Florida, Idaho, Nevada, Texas and Virginia. *See* Wilkes, § 3.2 at 124, App. A.

II. The Seventh Circuit's Decision Below Is Not In Conflict With This Court's Decisions In *Coleman*, *Harris*, And *Teague*.

The Seventh Circuit's decision below in this case is not in conflict with this Court's decisions in *Coleman v. Thompson*, 501 U.S. 722 (1991), *Harris v. Reed*, 489 U.S. 255 (1989), and *Teague v. Lane*, 489 U.S. 288 (1989). Not only does Petitioner's position fail to account for the distinctions in available post-conviction remedies among the different states, but Petitioner ignores differences in the availability of state supreme court review among states. Consistent with decisions of this Court, the Seventh Circuit in the decision below analyzed whether Respondent exhausted his state remedies by failing to raise all his federal claims in a petition for leave to appeal to the Illinois Supreme Court on collateral review according to Illinois law. *White*, 143 F.3d at 1053. The Seventh Circuit concluded that *under Illinois law* a habeas petitioner need not raise every federal claim in a petition for leave to appeal to the Illinois Supreme Court on collateral review. *Id.*

In *Coleman*, *Harris*, and *Teague*, this Court emphasized that a federal court properly may inquire into the availability of state court remedies to determine whether claims presented in a habeas petition have been exhausted in state court. *Harris*, 489 U.S. at 268 (O'Connor, J., concurring). To determine whether a particular remedy is available under state law, federal courts must assess the likelihood that a state court will grant the habeas petitioner a hearing on the merits of the claims. *Id.*, *see also Teague*, 489 U.S. at 297-98 (analyzing whether petitioner exhausted state court remedies according to Illinois law). That is precisely what the Seventh Circuit did in the decision below.

The Seventh Circuit's careful application of Illinois law to Respondent's particular use of the state collateral review procedure shows why this case does not present a compelling reason for this Court to grant certiorari. The Seventh Circuit correctly decided

that under Illinois law, Respondent exhausted his state court remedies even though he did not raise every ineffective assistance of counsel claim in his petition for discretionary review to the Illinois Supreme Court. Illinois Supreme Court review is discretionary with the Court and is dependent upon the criteria listed in Illinois Supreme Court Rule 315(a). In determining whether to grant a petition for leave to appeal, the Illinois Supreme Court evaluates the following criteria: the importance of the question presented; a conflict between the appellate court's decision and a decision of the supreme court or other appellate courts; the need for supervisory authority; and the final or interlocutory character of the judgment. *See* Ill. S. Ct. R. 315(a). Absent conflicting state law on the issue, case-specific issues relating to counsel's ineffective assistance in a criminal case on collateral appeal are *not* the type of issues that these criteria suggest the Illinois Supreme Court is likely to review. Because Respondent raised all of his ineffective assistance claims in his post-conviction petition to the trial court and appellate court, the Seventh Circuit correctly concluded that the Illinois courts were provided with a sufficient opportunity to review all of the ineffective assistance claims now raised in Respondent's habeas petition.

The Seventh Circuit's conclusion below, that Respondent's ineffective assistance of counsel claims were not procedurally defaulted under Illinois law, is consistent with *Coleman*, *Harris*, and *Teague*, as well as with concerns of comity and federalism, because the result reached by the Seventh Circuit depended largely on the provisions of Illinois law governing collateral relief and, in particular, discretionary review by the highest state court.

Indeed, it is difficult to imagine that the 50 states would view a ruling from this Court directing that all prisoners in the nation must *twice* appear before their state

supreme courts with all issues just to qualify to file a habeas corpus petition in federal court. Such a ruling would not be consistent with comity or with the view -- currently held not only by the states but by Congress as well, *see* Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132, 110 Stat. 1214 -- that state court convictions should be moved promptly to finality.

CONCLUSION

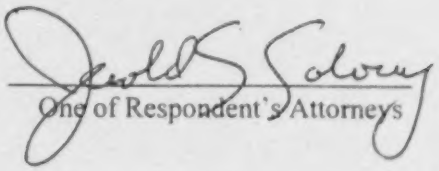
In seeking to meet the burden of establishing that this matter presents one of those rare instances in which the Court should exercise its discretion to grant certiorari for compelling reasons, Petitioner fails to show that the Seventh Circuit's decision below conflicts with the decisions of other court of appeals or with this Court's decisions in a way that justifies a grant of certiorari, in that the Seventh Circuit's decision reflects a sound analysis of the particular procedural factors at play when a person seeks state collateral relief

under Illinois' statutory scheme for such relief. Accordingly, the petition for writ of certiorari should be denied.

Dated: December 10, 1998

Respectfully submitted,

JEROME WHITE

By: 
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